

IN THE SUPREME COURT OF THE UNITED STATES

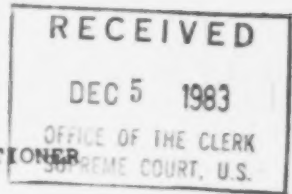
OCTOBER TERM, 1983

No. 82-1771

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.



ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

APPLICATION FOR MODIFICATION OF THE
COURT'S ORDER AUTHORIZING TWO COUNSEL
TO PRESENT ORAL ARGUMENT FOR FOUR
RESPONDENTS TO AUTHORIZING ONE OF
SAID COUNSEL TO SHARE HIS ARGUMENT
WITH A THIRD COUNSEL FOR RESPONDENTS

Pursuant to Rule 38.4 of the Rules of this Court, counsel for the four respondents herein requested leave to have oral argument presented by two counsel. On or about October 11, 1983, the Court granted said request. Due to circumstances occurring thereafter, counsel for three of the four respondents, namely, respondents Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo, request modification of the Court's prior order so as to permit two counsel to present oral argument on behalf of said three respondents, and one counsel to present oral argument on behalf of respondent Leon. Said two counsel seek no additional time to present oral argument, and merely seek to divide the time allotted for argument on behalf of said three respondents between two counsel. Moreover, each of the two counsel will address issues separate and distinct from those presented by either of the two other counsel arguing for respondents, so no repetition in argument is anticipated.

The grounds for this application are that counsel for

respondent Del Castillo and counsel for respondents Sanchez and Stewart advocate conflicting views as to what should be presented to the Court in oral argument as to their respective clients. In order to ensure that all three respondents are represented effectively, each of the two counsel request an opportunity to address the Court during argument. Both counsel recognize that the Court is not inclined to permit multiple counsel to present oral argument. However, both counsel firmly believe that due to the unusual circumstances of this case, no one counsel can represent all three respondents without conflict. It is counsels' concern for the interests of their respective clients that prompts this application and asks the Court's indulgence.

The issues presented in this case are whether the Court should adopt a reasonable good faith exception to the exclusionary rule and, if so, whether and to what extent such an exception would affect the searches pertaining to each of the respondents. The Court is being urged to undertake a most unusual task; namely, to essentially assume a legislative role and engage in rule making. Because such a process offers the Court wide latitude in formulating the parameters of its pronouncement, each respondent in this case has a dual argument. First, the respondents may argue jointly against adoption of any good faith exception. But, the respondents part company in arguing why, if some form of exception is adopted, it should not affect the judgment below as it pertains to each respondent. It is particularly the latter argument which has now caused the conflict between respondents Del Castillo and Sanchez and Stewart.

In their joint brief, counsel for the three respondents have primarily addressed the concern that no good-faith exception be fashioned in cases where a search warrant is found lacking in probable cause. However, it is anticipated that discussion at

oral argument may also involve the parameters of such an exception. This discussion may well pertain to the extent to which probable cause existed for each of three houses and four automobiles searched. For, as Mr. Justice White noted, in cases where the warrant is so "clearly lacking a basing in probable cause" a "'good faith' defense to invocation of the exclusionary rule" cannot be supported. Illinois v. Gates, 103 S.Ct. 2317, 2345, n. 17 (White, J., concurring).

Accordingly, respondent Del Castillo represents a different interest than that of respondents Sanchez and Stewart because he seeks to challenge a different search based upon a different quantum of probable cause. For example, the warrant affidavit indicated observation of a hand-to-hand sale of narcotics involving respondents Sanchez and Stewart and police surveillance focused on homes owned or registered to said respondents; whereas, respondent Del Castillo challenges the search of his automobile where the degree of probable cause in the warrant affidavit is markedly less than that for the home searches. Accordingly, the search challenged by Del Castillo is much closer to the "egregious" case to which petitioner acknowledges no good faith exception should apply than the searches challenged by respondents Sanchez and Stewart. Furthermore, the degree of the police officer's subjective or objective good faith and the reasonableness of the magistrate's decision authorizing the warrant also differ among the three respondents according to the differing degrees of probable cause.

In addition to the conflict prompted by differing degrees of probable cause and good faith, counsel for the three respondents are in disagreement as to which arguments against adoption of a good faith exception should be presented during oral argument. Since the issue at hand pertains to a proposed rule change, it

attracted a compilation of all arguments to the contrary presented in respondents' brief. Respondents chose to consolidate their arguments in one brief in order to promote expediency and avoid redundancy. However, counsel for the respective respondents have opposing views primarily on whether those arguments pertaining to the constitutional infirmities of the good faith proposal (Respondent Br., Arguments I, II, pages 10-29) should receive elaboration at oral argument or whether the arguments pertaining to policy grounds (Respondent Br., Arguments III, IV, pages 30-67) should receive such treatment.

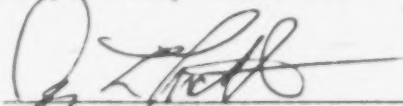
At the time of the filing of respondents' prior application for leave to present oral argument by two counsel, the degree of conflict between respondent Del Castillo and respondents Sanchez and Stewart was not readily apparent. It was only after preparation of the brief of respondents, consideration of arguments raised by amicus and respondent Leon, and full discussion of oral argument that the present conflict surfaced. This was due in part to the fact that the brief was written by the undersigned counsel for respondent Del Castillo and joined in by counsel for respondents Sanchez and Stewart - an event not foreseen or expected previously. Moreover, the conflict is deep-seeded as it derives from the recent realization that in exercising its rule-making function the Court may fashion an exception to the exclusionary rule that may draw a distinction, primarily along probable cause lines, between respondent Del Castillo and respondents Sanchez and Stewart. If discussion at oral argument pertains to such a distinction, one counsel representing all three respondents cannot effectively, and without conflict, present argument. Only with presentation of argument by one counsel representing respondent Del Castillo and one counsel representing respondents Sanchez and Stewart can all respondents be afforded

the benefit of effective representation.

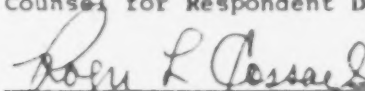
To conclude, counsel for respondent Del Castillo and counsel for respondents Sanchez and Stewart request leave to divide oral argument between them and hereby apply to the Court to modify its prior order accordingly.

November 30, 1983

Respectfully submitted,



JAY L. LICHTMAN
Counsel for Respondent Del Castillo



ROGER L. COZZACK
Counsel for Respondents Sanchez and
Stewart

PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of eighteen years and not a party to the within action; my business address is: 6420 Wilshire Boulevard, Los Angeles, California 90048.

On December 2, 1983, I served the foregoing Application for Modification of the Court's Order Authorizing Two Counsel to Present Oral Argument For Four Respondents To Authorizing One of Said Counsel to Share His Argument With a Third Counsel for Respondents on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California as follows:

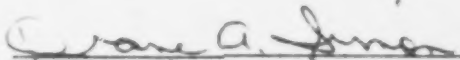
Norman Kaplan
205 South Broadway, Suite 100
Los Angeles, CA 90012

Barry Tarlow
9119 Sunset Boulevard
Los Angeles, CA 90069

Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

I certify under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on December 2, 1983 at Los Angeles, California.


Diane A. Simon